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In The

Supreme Court of the United States

DERMAN SHANNON

Petitioner,

v.

STATE OF ARIZONA REHABILITATION
SERVICES ADMINISTRATION

Respondent.

On A Petition for A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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* Plaintiff Pro se

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Ninth Circuit

correctly held that the district court properly granted summary judgment on Shannon's race discrimination claims concerning a 1999 remark made by a supervisor and a December, 2000 decision to extend Shannon's probationary period, because Shannon failed to first raise these claims with the EEOC.

2. Whether the United States Court of Appeals for the Ninth Circuit correctly held that the district court properly granted summary judgment on Shannon's claims regarding his reduction in grade without a pay decrease in 2002, and whether Shannon failed to raise a genuine issue of material fact as to whether his employer took this disciplinary measure due to a discriminatory motive rather than due to Shannon's misrepresentation on his job application of the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. State of Arizona Department of
Economic Security Rehabilitation
Services Administration, defendant-
appellee; and
2. Derman Shannon, plaintiff -appellant.

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PETITION FOR WRIT OF CERTIORARI

Derman Shannon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of court of appeals is not published. The district court's opinion granting summary judgment to defendant is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2005. The jurisdiction of the court is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part: "[T]he Laws of the United States * * * shall be the supreme Law of the Land * * * any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Section 703 (a) (1) of Title VII, 42 U.S.C. Section 2000e-2, provides that it shall be an unlawful employment practice for an employer * * * to discriminate against any

individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or *

Section 704 (a) of Title VII, 42 U.S.C. Section 2000e-3, provides that it shall be an unlawful employment practice for an employer to discriminate against any of its employees * * * because he has opposed any practice made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race. 42 U.S.C. - 2000e-2 et. seq. Prohibited discrimination includes racial harassment and retaliation. **Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993); 42 U.S.C. - 2002-3.**

Title VII requires employees who believe that they have been subjected to unlawful discrimination to file a claim with an administrative agency prior to proceeding to court. 42 U.S.C. Section 2000e-5(e) (1). A claim is not time barred in a continuing or ongoing action violation claim when an employee is intentionally and continuously subjected to a hostile work environment by an employer, even though an employee fails to file a claim with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the incident, or within 300 days of the incident if the employee first files the charge with a state or local agency.

Hostile work environment claims are different in kind from discrete acts. Because their very nature involves repeated conduct, the "unlawful employment practice," Section 2000e-5(e) (1), cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. **Harris Forklift Systems, Inc., 510 U.S. 17, 21 114 S.Ct. at 371 (1993).**

A Title VII plaintiff raising claims of discrete discriminatory or retaliatory acts must file his charge within

the appropriate 180- or 300-day period, but a charge alleging a hostile work environment will not be time-barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period; in neither instance is a court precluded from applying equitable doctrines that may toll or limit the time period. **National Railroad Passenger Corporation v. Morgan** (00-1614) 536 U.S. 101 (2002).

The Ninth Circuit, under the continuing violations doctrine, states that if a discriminatory act takes place within the limitations period, and that act is "related and similar to" acts that took place outside the limitations period, all the related acts - - including the earlier acts - - are actionable as part of a continuing violation, which allows plaintiffs to join time-barred Title VII claims. **Fielder v. UAL Corp.**, 218 F.3d 973 (9th Cir. 2000), **Anderson v. Reno** 190 F. 3d 930 (9th Cir. 1999), and **Draper v. Couer Rochester, Inc.**, 147 F3d 1104 (9th Cir. 1998)

The Ninth Circuit recognizes that although there is no statutory exception to the limitations period, the 300-day filing period, like a statute of limitations, may be subject to waiver, estoppel and equitable tolling.

The most widely accepted approach for analyzing the employer's liability for creating a hostile work environment was articulated by in **Faragher v. City of Boca Raton**, 524 U.S. at 807-808 and **Burlington Industries v. Ellerth**, 524 U.S. 742 (1998) Docket (97-569) affirmed. The Supreme Court held that employers are vicariously liable for supervisors who create hostile working conditions for those over whom they have authority. In cases where harassed employees suffer no job related consequences, employers may defend themselves against liability by showing that they

quickly acted to prevent and correct any harassing behavior and that the harassed employee failed to utilize their employer's protection. Such a defense, however, is not available when the alleged harassment culminates in an employment action, such as Ellerth's.

A widely accepted approach for determining proper granting of summary judgment was articulated in **Chuang v. University of California Davis**, No. 9915036 (9th Cir., August 30, 2000), which held that to survive summary judgment plaintiff needs to prove that employer's reason for adverse action was pretextual either "indirectly by showing that employer's proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable or, directly by showing that unlawful discrimination more likely motivated the employer."

A. Shannon's Employment At State of Arizona Department of Economic Security Rehabilitation Services Administration (RSA)

Derman Shannon ("Shannon"), an African-American male, began his employment with the State of Arizona Department of Economic Security Rehabilitation Services Administration as a counselor for the Severely Mental Ill (SMI) population in June of 1998 and was promoted to Acting Unit Supervisor in July 1999.

Shannon claims that after he began working with RSA, he was subjected to a pattern of racially discriminatory and retaliatory acts perpetrated by co-workers, supervisors, and managers, specifically Program Managers Barbara Knox and Anna Lira, Program Administrator, Fred Bingham, Assistant Directors Moises Gallegos and Thomas Columbo,

and Directors, John Clayton and David Berns. This conduct continued throughout Shannon's employment with RSA and culminated until he had to discontinue employment on or about November 24, 2003.

During Shannon's employment with RSA, he complained to employer over twenty (20) times of harassment, disparate impact, retaliation, defamation, employer negligence, and fraud, and employer never addressed, responded to and/or resolved issues.

Shannon claims that the first discriminatory act occurred on or about August 14, 1998 when Shannon was falsely accused of sexual harassment. Shannon also continued to complain about racial discrimination to RSA management. Despite Shannon's complaints discrimination and harassment never stopped.

B. Proceedings Below

The district court improperly granted summary judgment in the Defendant's favor on all grounds of discrimination which had been alleged by Shannon. The court held that Shannon failed to first raise these claims with the EEOC concerning a 1999 remark by a supervisor and a December, 2000 decision to extend Shannon's probationary period.

The district court also improperly granted summary judgment in defendant's favor on Shannon's claims regarding his reduction in grade without a pay decrease in 2002. The court held that Shannon failed to raise a genuine issue of material fact as to whether his employer took this disciplinary

measure due to a discriminatory motive rather than due to Shannon's misrepresentation on his job application of the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana.

The court of appeals affirmed the district courts decision that summary judgment was properly granted on the above stated claims and further held that Shannon's remaining contentions lacked merit. The court relied on 42 U.S.C. Section 2000e-16 (c), *Sommolino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001), *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 730 (9th Cir. 1984), and *Aragon v. Republic Silver State Disposal, Inc.*, to reject Shannon's reliance on the continuing violation doctrine.

REASONS FOR GRANTING THE WRIT

The petition for writ of certiorari should be granted in this matter as the outcome in this case conflicts with decisions regarding the enforcement of Title VII's limitations period. The Ninth Circuit in Shannon's case erroneously rejected the analysis of the continuing violation doctrine articulated by cases from both the Ninth Circuit and the Supreme Court of the United States. In *UAL v. Fielder*, 69 U.S.L.W. 3619 (U.S. March 7, 2001) (No. 00-1937) seeking review of 218 F.3d 973 (9th Cir. 2000). In *Fielder*, the Ninth Circuit held that in hostile environment and sexual harassment cases, a plaintiff may use the continuing violation doctrine to link timely and untimely Title VII claims whenever the "alleged discriminatory acts [which occurred within Title VII's limitations period] are related closely enough to constitute a continuing violation." *Fielder*, 218 F.3d at 987, (quoting *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472, 1480-81 (9th

Cir. 1989)). In this case, the Ninth Circuit has gone a step farther—holding that its “related closely enough” or “sufficiently related” test is not limited to cases of hostile environment and sexual harassment but applies to all cases of discrimination. In both this case and in **Fielder**, the Ninth Circuit applied its holding and allowed plaintiffs to recover for an assortment of very different time-barred claims under a continuing violation theory, notwithstanding their failure to file timely administrative charges challenging conduct which they concluded was unlawful ant or shortly after the time it occurred. *Id.*; **Fielder**, 218 F.3d at 989.

This case, like **Fielder**, presents the Court with an opportunity to provide guidance as to what events trigger the running of the limitations period under Title VII and when, if ever, a plaintiff can join untimely claims of alleged discrimination with claims that were the subject of a timely charge.

The petition for writ of certiorari should also be granted in this matter because the Ninth Circuit erroneously rejected the analysis of pretextual adverse action violations articulated by cases from the Ninth Circuit. In **Chuang v. University of California Davis No. 9915036**, the Ninth Circuit held that to survive summary judgment a plaintiff needs to prove that employer’s reason for adverse action was pretextual either “indirectly by showing that employer’s proffered explanation is unworthy of credence because it is internally inconsistent or otherwise not believable or, directly by showing that unlawful discrimination more likely motivated the employer.” Shannon satisfied that which was required by **Chuang**.

The petition for writ of certiorari should be granted in this matter because Shannon produced sufficient evidence of pretext in Title VII discrimination case.

Further review is warranted.

I. WHETHER THE UNITED STATES COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON SHANNON'S RACE DISCRIMINATION CLAIMS CONCERNING A 1999 REMARK MADE BY SUPERVISOR AND A DECEMBER, 2000 DECISION TO EXTEND SHANNON'S PROBATIONARY PERIOD, BECAUSE SHANNON FAILED TO RAISE THESE CLAIMS WITH EEOC

The Ninth Circuit erred by affirming that the district court properly granted summary judgment in Shannon's racial discrimination case that involves ongoing continuing act violations by employer, which subjected him to a hostile work environment. Moreover, the Ninth Circuit's decision expressly conflicts with this Court's rulings that hostile work environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

In *National Railroad Passenger Corp. v. Morgan*, 232 F.3d 1008 (2000), the Ninth Circuit reversed the

judgment in its entirety and remanded the case for a new trial on all of Morgan's allegations. In its view Morgan had presented sufficient evidence to create a genuine issue of fact that regarding the existence of a continuing violation of Title VII. Under the "continuing violations" doctrine, it explained, that courts may "consider conduct that would be ordinarily time barred as long as the untimely incidents represent an ongoing unlawful employment practice * * *"

In the Supreme Court's June 2002 decision in **National Railroad Passenger Corp. v. Morgan**, 536 U.S. 101 (2002), it was held that a charge of a hostile work environment claim, however will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period. The court noted, however, that the evidence of each alleged violation significantly overlaps and segregating them is both a difficult and artificial task. Likewise, see **Harris v. Forklift Systems Inc.**, 510 U.S. 17, 21, 114 S.Ct. 367 (1993).

Moreover, the Supreme Court in **Burlington Industries, Inc. v. Ellerth**, 524 U.S. 742 (1998) and **Faragher v. City of Boca Raton**, 524 U.S. 775 (1998), determined how and when employers would be held responsible for workplace harassment caused by supervisors against subordinates. First, employers would be strictly liable for such harassment if it resulted in an adverse job decision, such as firing or demotion * * *. Also, employers would even be strictly liable for harassment not resulting in an adverse job decision, unless the employer proved a two-pronged affirmative defense. The affirmative defense requires that the employer must prove that it had taken reasonable measure to prevent and correct, promptly, workplace harassment * * * behavior, and that the employee

unreasonably failed to take advantage of the protective measures adopted by the employer. The Supreme Court further held that the conduct by Faragher's supervisors and co-workers created a hostile work environment. **Montero v. AGCO Corp.**, 192 F.3d 856 (9th Cir. 1999); **Harris v. Forklift Systems, Inc.**, 510 U.S. 17 at 22, 114 Ct. at 371 (1993); and **Steiner v. Showboat Operating Co.**, 25F.3d 1459, 1464 (9th Cir. 1994).

In the Ninth Circuit, according to **Fielder v. UAL Corp.**, 218 F.3d 973 (9th Cir.2000), a plaintiff can establish a continuing violation in one or two ways. First, a continuing acts violation can be established by showing a series of related acts, one or more of which are within the limitations period - - a serial violation. A serial violation is established if evidence indicates that the alleged acts of discrimination occurring prior to the limitations period are sufficiently related to those occurring within the limitations period. The second way to establish a continuing violation, is to show a systematic policy or practice of discrimination that operated, in part, within the limitations period - - a systemic violation. Systemic violations involve "demonstrating a company wide policy or practice" and most often occur in matters of placement or promotion.

"A 'hostile work environment' occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment." **Draper v. Coeur Rochester, Inc.**, 147 F.3d at 1104, 1108 (citing **Meritor Savings Bank v Vinson** 477 U.S. 57, 66-67 (1986)). As the court noted in **Fielder**, "Most instances of hostile work environments are not capable of facile identification; instead, the day to day harassment is particularly significant, both as a legal and a practical matter, in its cumulative effect." **Fielder**, 218 F.3d at 985 (quoting **Draper**, 147 F. 3d at

1108). Likewise, in **Meritor** it was also held that in general, really severe conduct has been found to create a hostile environment after just one or two occasions.

Moreover, in **Anderson v. Reno**, 190 F.3d at 936-37 (9th Cir. 1999), the court applied the continuing violation doctrine where plaintiff filed suit in 1994 after experiencing harassment stretching back to 1986.

In Section 1 of the Fourteenth Amendment of the United States Constitution states that all persons born, or naturalized, in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

The United States Supreme Court has determined in both **Burlington v. Ellerth** and **Faragher v. City of Boca Raton** that an employer would be vicariously liable for creating a hostile work environment if they could not prove that it took reasonable measure to prevent, and correct promptly workplace harassment. The Ninth Circuit's decision conflicts with this Court's precedent and is erroneous. This Court should intervene to correct this decision.

II. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT PROPERLY GRANTED SUMMARY

**JUDGMENT ON SHANNON'S CLAIMS
REGARDING HIS REDUCTION IN GRADE
WITHOUT A PAY DECREASE IN 2002, AND
WHETHER SHANNON FAILED TO RAISE A
GENUINE ISSUE OF MATERIAL FACT AS TO
WHETHER HIS EMPLOYER TOOK THIS
DISCIPLINARY MEASURE DUE TO
DISCRIMINATORY MOTIVE RATHER THAN
DUE TO SHANNON'S MISREPRESENTATION
ON HIS JOB APPLICATION OF THE
CIRCUMSTANCES SURROUNDING HIS
ARREST FOR DRIVING A CAR CONTAINING
200 POUNDS OF MARIJUANA**

The Ninth Circuit erred by affirming that the district court properly granted summary judgment in Shannon's racial discrimination case involving his retaliatory demotion. To establish a *prima facie* case of retaliation under Title VII, plaintiff must show that he engaged in protected activity, suffered an adverse employment decision, and there was causal link between protected activity and the adverse employment decision. Civil Rights Act of 1964, Section 701 et seq., as amended, 42 U.S.C.A. Section 2000e et seq. The alleged voluntary grade reduction in 2002, and employer's false allegations that Shannon falsified his 1998 employment application involving the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana was a precursor to a retaliatory demotion.

Moreover, in *Reeves v. Sanderson Plumbing*, 530 U.S. 133 (2000), in a unanimous opinion delivered by Justice Sandra Day O'Connor, the Supreme Court held that "A plaintiff's *prima facie* case of discrimination combined with sufficient evidence for a reasonable factfinder to object the

employer's nondiscriminatory explanation for its decision, may be adequate to sustain a finding of liability for intentional discrimination." **Steiner v. Showboat Operating Co.**, (9th Cir. 1994) and **Folkerson v. Circus Circus Enterprises, Inc.**, 107 F 3d 754 (9th Cir. 1997).

In **Chuang v. University of California Davis**, No. 9915036 (9th Cir., August 30, 2000), it was determined that to survive summary judgment plaintiff needs to prove that employer's reason for adverse action was pretextual either "indirectly by showing the employer's proffered explanation was unworthy of credence because it is internally inconsistent or otherwise not believable or, directly by showing that unlawfully discrimination more likely motivated the employer."

The Ninth Circuit held in **Ray v. Henderson**, 217 F. 3d 1234 (9th Cir., 2000), that an employer retaliates against an employee when it treats the employee in an adverse manner based on retaliatory motive and is reasonably likely to deter the employee from engaging in a protected activity, and that a hostile work environment may be the basis for a retaliation claim under Title VII. See also, EEOC's Compliance Manual on Retaliation adopted by the Ninth Circuit and **Garden v. Lawn**, 805 F.2d 1400, 1405 (9th Cir., 1986).

Ninth Circuit held that a 'personnel action' motivated by "retaliatory animus" creates liability under Title VII regardless to whether that action would warrant the award of remedies. **Hashimoto v. Dalton**, 118 F 3d 671, 675 (9th Cir., 1997). In **Hashimoto**, the Court held that the Plaintiff had adduced sufficient evidence to give rise to a genuine issue of material fact concerning whether RTC took action against plaintiff in retaliation for his filing an EEOC complaint.

Defendant's motion for summary judgment on this claim was denied.

While it is true that one must threaten "wrongful" action in order to be guilty of duress, the landmark supreme case, on duress, **Kaplan v. Kaplan**, 25 Ill. 2d 181, 186, 182 N.E. 2d 706 (1962), says that the meaning of "wrongful" is "not limited to acts that are criminal, tortious, or in violation of a contractual duty, but extends to acts that are wrongful in a moral sense." **Kaplan**, 25 Ill. 2d at 186. Even though an employee may be terminable at will, it is not impossible for the threat of discharge to constitute duress. **Mitchell v. C.C. Sanitation Co.**, 430 S. W. 2d 933 (Texas Civ. App. 14th District 1968).

In 35 Am. Jur. Section 273, **Master And Servant**, it is said, * * * accordingly, in determining the issue as to responsibility for the employee's injury, much importance attaches in the fact that the employer or his representative gave a command, order, or direction to the employee to do the act which resulted in injury to the latter. Where this fact is shown, the issue as to responsibility or negligence is held, ordinarily, to be properly submitted to the jury. It is a fundamental of the relation of master and servant that the servant shall yield obedience to the master, and this obedience an employee properly may accord even on being confronted with perils that otherwise should be avoided * *

The Ninth Circuit has explicitly rejected the analyses used by the U.S. Supreme Court in **Reeves v. Sanderson** where the Supreme Court held that a plaintiff after establishing a prima facie case of discrimination combined with sufficient evidence for a reasonable factfinder to object employer's nondiscriminatory explanation for its decision

may be adequate to sustain a finding of liability for intentional discrimination. There is no doubt that under this analysis, a reasonable factfinder would find that the court of appeals erred.

The First Amendment to the United States Constitution of the United States of America protects state employees from patronage dismissals, but also from "even an act of retaliation as trivial as failing to hold a birthday party for a public employee * * * when intended to punish him or her for exercising his or her free speech rights."

For all these reasons, the Ninth Circuit's decision is wrong and conflicts with this Court and its interpretation of the law. Further review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 2005

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DERMAN SHANNON	)No. 04 - 16513
Plaintiff - Appellant,	)D.C. No. CV.-02-02585-EHC
)
v.	) JUDGMENT
)
ARIZONA DIRECTOR)
ECONOMIC SECURITY,)
DEPARTMENT OF; et al.,)
Defendants - Appellees.)

Appeal from the United States District Court for the District of Arizona (Phoenix). This cause came on to be heard on the Transcript of the Record from The United States District Court for the District of Arizona (Phoenix) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **AFFIRMED**.

Filed and entered 06/22/05

JUL 14 2005

"s/Gabriela NawAll"
Deputy Clerk

SUMMARY

The district court affirmed summary judgment in favor of Shannon's employer to time-bar the 1999 derogatory remark by his supervisor and the 2001 extension of probation incident as discrete acts which required a charge to the EEOC within three hundred days of each event. The district court also affirmed summary judgment in favor of Shannon's employer RSA regarding his 2002 demotion and unwarranted transfer which was the subject of a timely charge, because the discipline administered was based on legitimate and non-discriminatory reasons. RSA misrepresented the facts regarding whether Shannon had a felony conviction for drug trafficking. Shannon does not have any felony convictions. Shannon received a Suspended Imposition Sentence in the State of Missouri in 1995. Pursuant to the laws of the State of Missouri, a Suspended Imposition Sentence is not a conviction.

The court of appeals affirmed the district court's summary judgment in favor of Shannon's employer. The court held that when an employer's pre-limitations period discriminatory conduct is part of a series or pattern of discrimination, retaliation, and hostile environment, the continuing violation doctrine applies and the pre-limitations period conduct should be presented to the jury for purposes of liability, but Shannon's contentions lack merit.

Appellant Derman Shannon, an African-American male, applied for a job with Appellee, State of Arizona Department of Economic Security (DES) on October 1996 and was promoted to State of Arizona DES Rehabilitation Services Administration (RSA) on July 1998. From the date of his hire with DES RSA to his having to stop work with

RSA four years later, due to occupational related Major Depression and Anxiety Disorders, Shannon complained over twenty times to employer regarding workplace harassment by supervisors, managers, directors and co-workers. However, employer never responded to, corrected, and/or prevented the harassment.

On September 11, 2002, prior to his demotion and unwarranted transfer, Shannon filed a charge of race discrimination in violation of Title VII of the Civil Rights Act of 1964 against DES RSA with the Equal Employment Opportunity Commission (EEOC) including continuing action. EEOC issued a right to sue letter. On November 1, 2002, after his demotion and unwarranted transfer, Shannon filed a second charge against DES RSA with the Equal Opportunity Commission (EEOC) and received another right to sue letter and Shannon filed suit against DES RSA in federal court, alleging violations of Title VII of the Civil Rights Act including discrimination, retaliation and hostile work environment.

The court also agreed with RSA that Shannon provided no evidence to suggest that he did not voluntarily accept the demotion or unwarranted transfer or that the demotion was involuntary or based on race, gender, or retaliation, even though Shannon complained to internal employment entities (RSA district office, RSA central office, Director of DES), twice to EEOC and received two notice of rights to sue letters, and externally (State of Arizona Ombudsman).

The court of appeals affirmed the district courts decision of granting summary judgment to Shannon's employer, State of Arizona DES RSA, stating that Shannon's contentions lack merit.

1) Incidents Prior To the Limitations Period

Shannon applied for job with State of Arizona DES RSA in 1998. Although educated with a Master's Degree in Education and Supervision and experienced in the Human Resource field, Shannon began working as a Human Resource Specialist (rehabilitation counselor).

On August 14, 1998 Shannon was cleared of sexual harassment charge but requested in writing that employer discipline his co-workers, female Karen Holloway and female Nadia who was responsible for false accusations, but employer never responded to Shannon nor corrected issue.

On or about September 16, 1998 Shannon complained to Program Manager Lira in writing about his being subjected to a hostile work environment by co-worker Karen Holloway. Program Manager never responded to nor resolved issue.

On or about October 1, 1998 Program Administrator Fred Bingham counseled Shannon verbally and in writing regarding Karen Holloway's allegation that Shannon made inappropriate statement to a client. Shannon responded to allegations verbally and in writing. Bingham never responded nor resolved issue.

On October 9, 1998, Shannon verbally and in writing requested that Administrator Bingham investigate the facts regarding false allegations by Karen Holloway, by speaking to direct witnesses (client and another counselor) as a means of protecting Shannon's reputation. Bingham never responded nor resolved issue.

On or about November 23, 1998 Shannon complained to Program Manager Barbara Knox in writing, informing her

that several employees made Shannon aware that Karen Holloway made derogatory statements about Shannon in a clinical staff meeting. Program Manager Knox never responded nor resolved issue.

On or about March 1999, Shannon reported verbally and in written of massive agency malfeasance and harm to clients to Program Manager Knox regarding Vendor Reports. Program Manager Knox never responded nor resolved issue.

On or about May 6, 1999 Acting Supervisor Hilda Celaya confronted Shannon directly after office staff meeting and said that Program Manager Knox had just called and stated that Shannon allegedly told someone that he was a 'former pimp.' Shannon immediately contacted Knox in writing requesting that Knox promptly resolve—issue. Program Manager Knox never responded, corrected nor prevented harassment.

On or about November of 1999 Shannon reported to Knox verbally and in writing, details of what appeared to be wasteful expenditures paid to vendor by Karen Holloway totaling tens of thousands of state and federal taxpayers' dollars, but Program Manager Knox never responded, corrected, nor resolved issue.

On April 3, 2000 Shannon confronted RSA Program Manager Anna Lira verbally and Program Manager Linda Shuttleworth in writing regarding Shuttleworth's allegation that Shannon refused to work with a client and provided proof to support. Neither Program Manager neither responded to Shannon's complaint nor corrected issue.

On April 21, 2000, Shannon answered requested questionnaire from DES RSA Central Office Manager and

reported disparate treatment in regard to salary, job responsibilities, experience and education. RSA Manager never responded nor corrected issue.

On or about September 2000 Shannon reported to Knox in writing regarding as much as a \$13,000 contrast in Shannon's salary to other employees who were less educated and had fewer job responsibility and lower level of difficulty. Program Manager Knox never responded nor corrected issue.

On September 7, 2000 Shannon reported salary discrimination in response to a questionnaire sent to all DES employees from Director John Clayton of DES. Director of DES never responded nor resolved issue.

On or about December 19, 2000 Shannon notified Program Managers Knox and Lira regarding insubordination by one of Shannon's subordinates. Neither Knox nor Lira responded to nor resolved issue.

On January 8, 2001, two days prior to Shannon's promotional probation end date, Administrator Bingham wrote correspondence to Assistant Director Gallegos with purpose of getting permission to extend Shannon's probation for allegations of DES policy violations that Bingham knew were impossible for Shannon to violate. Bingham never corrected issue.

On or about January 11, 2001 Shannon emailed program Manager Knox regarding a RSA policy question which directly linked Knox and Bingham to over a decade of misrepresentation of fact and agency malfeasance. Knox never responded to Shannon's request.

On January 11, 2001, a day after Shannon's promotional probation had officially ended, Program Managers Knox and Lira verbally and in writing counseled Shannon and extended Shannon's probation without any entries on Communication Record regarding administrative nor performance difficulties. With over 25 years of DES RSA tenure, Program managers should have known that they violated DES policy but never corrected issue.

On or about January 15, 2001 Shannon complained in a written rebuttal to Knox regarding Knox, Lira and Administrator Bingham's knowledge of facts misrepresented on Shannon's promotional probation evaluation and mentioned of their roles in over a decade of agency malfeasance that was harmful to clients. Program Manager Knox never responded to complaint nor resolved issue.

On January 17, 2001 Shannon complained to Administrator Bingham in writing with cc: Director of DES, about being exposed to continuous harassment by administration which was causing serious medical problems and family problems, and literally begged employer for help. Neither Bingham nor Director of DES responded to Shannon's request for intervention nor corrected issue.

On or about January 19, 2001, Shannon satisfied the Grievance discussion indicating intentional Title VII violations by supervisor, pointing out policy violations that should have been obvious which subjected Plaintiff to emotional distress. Employer never resolved issue.

On or about January 26, 2001, Program Manager Knox forwarded ESTEEM Step I Grievance Response to Shannon that showed direct evidence of retaliation and inference of disapproval of Shannon's requesting a fair salary. Program Manager never responded nor corrected issue.

On or about February 8, 2001, Shannon complained to Knox about his being harassed by office secretary who worked for Knox approximately 30 years. Program Knox never addressed nor corrected issue.

On or about February 15, 2001, 2-3 weeks prior to female subordinate employee's probation end date, Plaintiff Shannon met with Knox and took employee's Communication Record entries that pointing out performance difficulties and requested direction. Knox failed to respond but later notified Shannon and directed Shannon in writing to put employee into permanent status by default. Knox never corrected the issue.

On February 22, 2001 Shannon complained to Knox regarding disparate treatment involving his probation being extended a day after his probation end date, without any entries on Communication Record of performance difficulties in contrast to her directing Shannon to grant female subordinate permanent probation status who had many entries of performance difficulties on her Communication Record. Knox never responded to nor corrected issue.

On or about February 22, 2001 office secretary who worked for Knox approximately 30 years and friends with Bingham and Lira for just as long, filed grievance against Plaintiff Shannon to get her rating of "Meet Expectations" in the area of Customer Service changed to "Exceeds

Expectations," even though female secretary was aware of several employee complaints against her during the assessment period (2/1/00-1/31/01).

On or about February 27, 2001 office social worker who worked for Knox approximately 30 years and friends with Bingham and Lira for just as long, filed a grievance against Plaintiff Shannon, to get her rating of "Meets Expectations" in the area of Customer Service changed to "Exceed Expectations" during the assessment period (2/1/00-1/31/01), even though female social worker had 3 different client complaints in writing during the period.

On March 8, 2001 Shannon was notified in writing by Administrator Bingham that Shannon had lost his grievance to get his assessment rating changed from "Below Expectations" to at least a "Meets Expectations," even though Shannon had absolutely ¹no notification of

¹ July of 2000 direct evidence in writing showed that Shannon was promoted from Acting Unit Supervisor because of office accomplished to Unit Supervisor.

August of 2000, direct evidence in writing showed that as a supervisor on probation, Shannon's office goals superseded those of seasoned supervisors.

August of 2000, direct evidence in writing showed that Shannon was nominated for "Professional of the Year."

September 2000, direct evidence in writing showed that Shannon was honored at State of Arizona Annual RSA Recognition Ceremony and presented an award.

October 2000, on or about, Shannon facilitated 'Diversity Training' for new RSA candidates by request from employer.

On October 13, 2000 direct evidence in writing showed that Shannon received "Pride of the Spot" award for Teamwork, Integrity,

performance or administrative difficulties during the assessment period, only accolades.

On March 16, 2001 Shannon complained in writing to Assistant Director Moises Gallegos regarding disparate treatment concerning female subordinate employee's being allowed permanent status with entries of indicating performance difficulties on her Communication Record, in contrast to Shannon's probation being extended with no performance difficulties and his being sent to supervisor training, and loss of grievance. Employer never corrected issue.

On or about April 2, 2001 Shannon requested from Personnel an expedited lateral transfer in writing from the supervisor's job due to intolerable working conditions and intentional subjection to emotional distress by employer.

On or about April 2, 2001 Shannon followed up on a training interview with DESRSA training department that had two openings and had neither males nor African-Americans in department. Even though employer had Shannon utilize his expertise as a trainer twice before, RSA

Quest for Quality, Customer Service, Morale Building and Good Citizenship.

On October 16, 2000 direct evidence in writing and photographs, showed that Shannon was honored on Bosses Day and supervisors and managers from RSA District Office and Central Office attended.

On October 24, 2000 direct evidence in writing from DES RSA Monitor's Report showed that as office unit supervisor Shannon's overall office statistics were good.

hired two white females with less training, same education and less experience. DES never responded.

On or about April 5, 2001 Shannon and Cruz were notified in writing from Bingham that female subordinate Cruz had won her grievance against Plaintiff Shannon and Shannon was instructed to change Cruz's assessment score to "Exceeds Expectations."

On or about April 5, 2001 Shannon and Espinoza was notified in writing from Administrator Bingham that female subordinate Espinoza had won her grievance against Plaintiff Shannon and Shannon was instructed to change Espinoza's assessment to "Exceeds Expectation."

On or about April 25, 2001 employer requested from Arizona Department of Public Safety and received fingerprint report which informed employer that Plaintiff Shannon had no felony convictions on criminal record.

On or about May 31, 2001 employer requested from United States Department of Justice Federal Bureau of Investigation (F.B.I.) Criminal Justice Information Services Division and received fingerprint report which informed employer that Plaintiff Shannon had no felony convictions on criminal record.

On March 16, 2002 Shannon corresponded in writing to Assistant Director Moises Gallegos complaining of intentional racism by DES RSA Administration and stated that the unit supervisor job was of no interest because of intolerable working conditions. Assistant Director Gallegos never responded neither did he prevent nor correct intentional subjection of emotion distress.

2) Incidents Within Limitations Period

On September 5, 2002 Shannon received an official notice of charges of misconduct from DES Assistant Director Thomas Columbo accusing Shannon of falsifying his employment application dated April 15, 1998 and therefore misled the department in regards to his alleged felony conviction of 1994/1995.

On September 11, 2002 Shannon filed a Title VII racial discrimination claim against State of Arizona DES RSA including, hostile work environment, continuing action, disparate treatment of African-American males, and Retaliation. Shannon received a Notice of Right to Sue.

On October 1, 2002 Shannon visited the State of Arizona Ombudsman, and reported myriad State of Arizona Policy violations and Title VII violations, including intentional discrimination by supervisors, administrator, co-workers and Director's Office and left evidence with ombudsman to support allegations. State of Arizona Ombudsman never resolved issue.

On October 9, 2002, Ombudsman who commuted from Nevada to Arizona acknowledged in writing her confirming that Shannon was emotionally distraught due to infliction of emotional distress by supervisors and managers and included her out of state home telephone number to call her stating that Shannon shouldn't try to handle everything or handle it alone.

On October 17, 2002 Shannon was called to a demotion meeting with Bingham and Knox and was threatened with termination if Shannon did not sign letter

requesting a voluntary grade decrease for allegedly falsifying an April 15, 1998 application regarding an alleged felony conviction and agree to an unwarranted transfer on October 18, 2002.

On October 18, 2002 Shannon did not report to new office but instead, went the State of Arizona Ombudsman's Office and made complaint of continuing violations of harassment by supervisors and managers and left documents to support complaints. State of Arizona Ombudsman never corrected nor resolved issue.

On October 30, 2002 Shannon visited Psychologist Ellen Johnston, was diagnosed with work-related depression and Johnston suggested that Shannon be prescribed psychotropic medication.

On November 1, 2002, Shannon filed another EEOC claim for continuing Title VII Violations including subjection to hostile work environment, intentional subjection to emotional distress, retaliation and disparate treatment because of race and gender and received another Notice of Right to Sue.

3) Continued Incidents After 2nd EEOC Claim Filed and Until Shannon Had to

² On April 25, 2001 RSA requested and received Shannon's Criminal History Record from Arizona Department of Public Safety which stated that Shannon had no felony convictions.

On May 21, 2001 RSA requested and received Shannon's Criminal History Record from the Federal Bureau of Investigations (FBI) which stated that Shannon had no felony convictions.

**Discontinue Employment Due to
Occupational-Related Illness**

On February 17, 2003 Shannon reported to supervisor and to Administrator Bingham DES RSA Policy violations by Program Manager involving economic need to supervisor and Administrator Bingham. DES never responded nor corrected issue.

On or about July 25, 2003 Shannon visited Licensed Psychologist and Registered Pharmacist, Will Counts R.Ph.Ph.D., and was diagnosed with Occupational-related Major Depression and Anxiety Disorder Episode and Shannon began immediately taking psychotropic medications.

On August 18, 2003 Shannon went into RSA break room and saw a 4 page racist email posted on the break room wall which demeaned American-Americans, tore the posting off wall and reported derogatory posting to supervisor.

On September 12, 2003 an Order was signed by district court judge ordering Shannon to undergo an independent psychological evaluation, by a psychologist hired by employer, DES RSA.

On October 13, 2003 Shannon underwent a psychological evaluation administered by Al Silberman, Ed.D psychologist of State of Arizona's RSA's choice, and psychologist affirmed that if Shannon had been discriminated against by employer, Shannon certainly had been affected by depression and anxiety as confirmed by two other psychologists. Dr. Silberman suggested, in writing, that

employer further investigate all of Shannon's allegations. Employer never responded nor corrected issue.

On October 29, 2003 Shannon complained to the State of Arizona Director of DES, David Berns, in writing that ³the majority of African-American male employees

³ The total amount of African-American male employees hired by RSA consisted of 11 and 82% of those suffered disparate impact and treatment:

- 1) Willie Williams was ostracized and had active lawsuit in Federal Court when he died in 1999; district court knew that the majority of Williams's fellow employees would testify that that they felt RSA's treatment of Williams contributed to his death.
- 2) Frank Johnson was ostracized, demoted from supervisory position, put on house arrest, and takes psychotropic medication for occupational-related depression and anxiety
- 3) Daniel Adonis was ostracized, forced out of supervisory position and left employment due to occupational related illness due to intolerable work conditions.
- 4) Weldon Saafir was ostracized because of personnel leak shared with all RSA employees in State.
- 5) Elwood Horsey was ostracized, taken out of Master's Program and diagnosed with occupational-related Depression.
- 6) Rick Rios was ostracized and later fired.
- 7) Plaintiff Derman Shannon was ostracized forced out of supervisory position and now receives long-term disability and Social Security due to occupation-related Major Depression and Anxiety Disorder.
- 8) John Monagai was ostracized, suffered from occupational-related depression and left employment due to intolerable working conditions.

(which totaled 11) had been discriminated against, subjected to a hostile work environment, and suggested that the Director speak to all of the African-American employees to confirm racism. Director of DES never responded nor corrected issue.

On or about November 24, 2003 Shannon made attempt to go to work but was not mentally able to drive into the parking lot. Consequently, Shannon had to quit employment and go on occupational-related disability for ongoing intentional subjection of Title VII discrimination initiated by same group of supervisors and managers.

On or about May of 2004 Plaintiff Shannon and two dependents began receiving and continue to receive monthly benefits from Social Security Administration and Shannon receives monthly benefits from Long Term Disability from the State of Arizona for Major Depression and Anxiety Disorder.

4) Overall Environment

Shannon presented evidence to the district court that he and the majority of his fellow African-American male employees had been subjected to racial discrimination and were willing to testify in a jury trial of being in an extreme

9) Felix Dean was ostracized, suffered from occupational-related illness for working in intolerable working conditions and later fired.

10) Patrick Young left employment with RSA.

11) Ray Carr remains

racially-laden working atmosphere at RSA. The majority of the African-American male employees were aware that RSA had only hired 2 of the total 11 African-American males from 1972 until 22 years later in 1994. Shannon presented evidence to the district court with dates which showed a systematic pattern of race discrimination against the majority of the African-American males employed by State of Arizona RSA happening simultaneously. Moreover, the majority African-American male employees would testify to a racially offensive work atmosphere under Administrator Bingham's leadership. Specifically: 1) Willie Williams, a supervisor with 30 years experience, was not promoted but less experienced whites were; 2) in March 2000 Elwood Horsey went to psychologist and diagnosed with occupational related depression; 3) in November 2000 Daniel Adonis wrote letter asking for down grade due to occupational related stress; 4) in January 2001 Shannon was given an adverse action probation extension, filed grievance; 5) in February 2001 Adonis reported being called a 'token nigger' by subordinates; 6) March 2001 Shannon lost grievance; 7) April 2001 Felix Dean was called 'Dean boy' and filed and lost grievance for that and other disparate treatment; 8) in April 2002 Frank Johnson, a supervisor with 30 years experience was demoted to counselor; 9) October 2002 Weldon Saafir was alleged to be a pervert on email going out to all RSA staff; 10) October 2002 Shannon was demoted; 11) December 2002 Felix Dean complained for being re-fingerprinted.

With regard to district court's granting summary judgment in favor of Shannon's employer, Shannon argues that the district court and court of appeals erred in granting summary judgment in favor of employer. Shannon's testimony and the willing testimony of the majority of

African-American male employees go the pervasiveness of the conduct at issue.

Shannon encourages the U.S. Supreme Court when ruling on the acceptance of Shannon's writ, to consider all evidence in light of its relevance to whether the defendant's conduct may be considered severe and pervasive. Shannon's case is extraordinary and a jury trial should be the fact finder.

05-564 SEP 10 2005

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DERMAN SHANNON

Petitioner,

v.

STATE OF ARIZONA REHABILITATION
SERVICES ADMINISTRATION
Respondent.

**SUPPLEMENTAL
APPENDIX**

DERMAN SHANNON *
25514 AUTUMNWIND CT.
KATY, TEXAS 77494

* Plaintiff Pro se (281) 395-8190

In The
Supreme Court of the United States

DERMAN SHANNON
Petitioner,

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STATE OF ARIZONA REHABILITATION
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Respondent.

**SUPPLEMENTAL
APPENDIX**

DERMAN SHANNON *
25514 AUTUMNWIND CT.
KATY, TEXAS 77494

* Plaintiff Pro se (281) 395-8190

1b

Derman Shannon
25514 Autumnwind Ct.
Katy, Texas 77494

October _____, 2005

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

RE: Shannon v. Arizona Rehabilitation Services
Administration

The following documents are forwarded as Supplemental
Appendix as requested by September 22, 2005
correspondence from Clerk of Supreme Court with two
exceptions (*):

1. **Memorandum** opinion of the Ninth Circuit Court of Appeals filed June 22, 2005
2. **Minute Entry** filed April 27, 2004 is not available in the District Court and the Court of Appeals do not photo copy and send records out of State (*)
3. **Order** granting summary judgment filed June 30, 2004
4. **Judgment** granting motion for summary judgment, also filed June 30, 2004
5. **Joint Proposed Case Management Plan** filed April 9, 2003 (*)

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

DERMAN SHANNON,	) No. 04-16513
)
Plaintiff – Appellant,	) D.C.No.CV-02-02585-EHC
)
v.	) MEMORANDUM*
)
ARIZONA DIRECTOR)
ECONOMIC SECURITY,)
DEPARTMENT OF; ET AL.,)
)
Defendants – Appellees.)
)

Appeal from the United States District Court
- for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Submitted June 14, 2005**

Before: KLEINFELD, TASHIMA, and THOMAS, Circuit
Judges.

Derman Shannon appeals pro se the district court's
summary judgment in favor of his employer, the Arizona
Department of Economic Security Vocational

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2)

Rehabilitation Services Administration ("DES"), in his Title VII action alleging racial discrimination and a hostile workplace. We have jurisdiction pursuant to 28 U.S.C. Sec. 1291. We review de novo, *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc), and we affirm.

The district court properly granted summary judgment on Shannon's race discrimination claims concerning a 1999 remark made by a supervisor and a December, 2000 decision to extend Shannon's probationary period, because Shannon failed to first raise these claims with the EEOC. See 42 U.S.C. Sec 2000e-16©; *Sommatino v. United States*, 255 F.3d 704, 708 (9th Cir. 2001); *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732

F.2d 726, 730 (9th Cir. 1984) (requiring separate EEOC complaints where claims are not so closely related that agency action would be redundant).

The district court properly granted summary judgment on Shannon's claims regarding his reduction in grade without a pay decrease in 2002. Shannon failed to raise a genuine issue of material fact as to whether his employer took this disciplinary measure due to a discriminatory motive rather than due to Shannon's misrepresentation on his job application of the circumstances surrounding his arrest for driving a car containing 200 pounds of marijuana. See *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654, 658-59 (9th Cir. 2002).

Shannon's remaining contentions lack merit.

Shannon's motion to file an addendum in support of his brief is granted. The clerk shall file the addendum received November 16, 2004.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Derman Shannon,	)	No. CIV 02-2585-PHX-EHC
)	
Plaintiff,	)	ORDER
)	
Vs.)	
)	
Arizona Department)	
of Economic Security)	
Vocational Rehabilitation)	
Services Administration,)	
)	
Defendant.)	
)	

Pending before the Court is Defendant's Motion for Summary Judgment. [Dkt. 40-1]. Plaintiff filed a Response [Dkt. 51] and Defendant filed a Reply [Dkt. 46]. The matter is now fully briefed.

I. Background

A. Complaint

Plaintiff Derman Shannon ("Shannon")¹ filed a Complaint on December 23, 2002. Plaintiff alleges, *inter*

alia:

[T]hat on or about April of 1999, an acting supervisor informed the Plaintiff that another supervisor had informed her that the Plaintiff was, allegedly, self-describing himself as a “former pimp”, which would be an anathema to any African-American professional. The Plaintiff immediately reported this conversation to the supposedly outspoken supervisor, yet no subsequent investigation or resolution ever occurred concerning the matter.

1

Shannon is a pro se litigant who earned a Master's degree in 1990. [Dkt. 52, Par. 4].

The Plaintiff believes a hostile work environment developed from this situation.

The Plaintiff also alleges that, during his employment [as an Acting Unit Supervisor], although his own supervisory statistical accomplishment pertaining to successful rehabilitations completed easily superceded the office statistical goals, the Defendants' ongoing employment practices concerning African-American supervisors continues to cause a disparate impact on the basis of race that is not consistent with any business necessity, which is a clear violation of Title 42 United States Code Section 2000e-2(k)(1).

The Plaintiff also alleges that, on October 17, 2002, he suffered a retaliatory demotion after the Defendant discovered that the Plaintiff had performed the protected act of filing a complaint with the EEOC, on September 11, 2002, after a demotion had been threatened by the Defendant based upon pretext.

[Dkt. 1].

Shannon further alleges that he "was subjected to a hostile work environment being developed against him due to unresolved slanderous false innuendoes being cast about concerning his character in the workplace by supervisory personnel." [Dkt. 1]. Shannon believes that his success as an Acting Unit Supervisor resulted in his promotion to Unit Supervisor in July 2000. [Dkt. 1].

In January 2001, Arizona Department of Economic Security Vocational Rehabilitation Services Administration ("DES") extended Shannon's probationary period by ninety days. [Dkt. 1]. Shannon alleges that his probation was "improperly extended by a ruse of pretext involving post-dated communications which the Plaintiff had never received prior to their presentation." [Dkt. 1]. DES asserts that the probationary period was extended because DES discovered that Plaintiff had falsified his 1998 employment application with respect to the details of his prior felony charge. [Dkt. 1].

Plaintiff concludes his Complaint by alleging:

It is the opinion of the Plaintiff pro se here that the Defendants have wantonly and illegally conspired to create for, and place the Plaintiff in, a hostile work environment which would stung and thereby torment his aspirations for helping disabled applicants coming before him for services, with a total disregard to the impact such a course of action would have upon the Plaintiff and his family.

[Dkt. 1].

Shannon alleges a hostile work environment and racial discrimination by DES in violation of Title VII of the Civil Rights Act of 1964 and "pendant violations of Arizona State law." [Dkt. 1]. Shannon requests ten million dollars (\$10,000,000.00) in compensatory damages for racial discrimination, retaliation, and negligent and intentional infliction of emotional distress.² [Dkt. 1]. Further, Shannon asks for fifteen million dollars (\$15,000,000.00) in punitive damages and a permanent injunction.

B. Defendant's Motion for Summary Judgment [Dkt. 40]

DES moved for summary judgment [Dkt. 40] and averred the following alleged undisputed facts:

Shannon, an African-American, applied for employment with DES on October 2, 1996. [Dkt. 41, p.1]. In the application, Shannon disclosed that "I unknowingly was driving a car that contained marijuana inside - 1994 -

Missouri; I signed a plea." [Dkt. 41, p.1]. Shannon was hired as a Public Assistance Eligibility Investigator I. [Dkt. 41, p.1]. Plaintiff subsequently applied, and was promoted, for various positions within DES, and he disclosed his prior felony conviction using similar language. [Dkt. 41, p.2].

In 1998, Shannon was promoted to Rehabilitation Services Specialist III in the Rehabilitation Services Administration of DES. [Dkt. 41, p.2].

2

Shannon asserts that his emotional distress was "so severe that Plaintiff began isolating from his family and became immediately depressed." [Dkt. 52, Par 6]. Further, Shannon alleges that he "fought against thoughts of harming those who maliciously wronged him fraudulently, and through prayer was directed to do the right thing and go through the Grievance Process." [Dkt. 52, Par. 6].

3

Similar explanations included (1) "marijuana was in my possession, unknowingly (1994) Missouri conviction to be overturned 7/98;" (2) "1994, marijuana unknowingly in my possession. I was innocent;" and (3) "1994 marijuana was in my possession unknowingly (Missouri) not on probation." [Dkt. 41, p.2] (emphasis in original).

On May 6, 1999, Shannon complained to Knox about
4
a co-worker claiming Shannon was a "former pimp," a
comment referenced in his Complaint, *supra*. [Dkt. 41, p.2].
Shannon did not file an EEOC claim regarding this
incident. [Dkt. 41, p.2].

On November 8, 1999, Knox promoted Shannon to
Acting Unit Supervisor, to serve in her place because of
Knox's own recent promotion. [Dkt. 41, p.2]. In July 2000,
Shannon became Unit Supervisor based upon Knox's
recommendation. [Dkt. 41, p.2]. DES requires a six-month
probationary period upon promotion to Unit Supervisor.
[Dkt. 41, p.2-3].

5
On January 4, 2001, Knox met with Shannon
pursuant to complaints that Shannon had mistreated his
employees. [Dkt. 41, p.3]. Knox recommended that
Shannon's probationary period be extended for ninety (90)

days so that an investigation could be conducted. [Dkt. 41, p.3]. Shannon did not file an EEOC claim regarding this incident. [Dkt. 41, p.3].

On April 6, 2001, while the investigation was still being conducted, Shannon applied for a position in the Juvenile Corrections Unit of DES. [Dkt. 41, p.3]. Shannon's transfer was approved on April 7, 2001. [Dkt. 41, p.3]. Shannon reported to Ilene Herberg, Unit Supervisor, who subsequently gave Shannon a satisfactory performance review. [Dkt. 41, p.3].

The investigation disclosed that Shannon had been charged with "Intent to Distribute Controlled Substance" on December 31, 1994 in Missouri. [Dkt. 41, p.3]. On

4Shannon maintains that the co-worker is Knox and contests DES's "false inference that Plaintiff was not aware of the person who [made the comment]." [Dkt. 52, Par. 3].

5Shannon alleges that the meeting occurred on January 11, 2001, one day after Shannon's official probation end date. [Dkt. 52, Par. 5].

December 5, 1995, Shannon entered a plea of guilty of the charge of "traffic in Drugs Second Degree." [Dkt. 41, p.3].

The Court suspended Shannon's incarceration and sentenced him to five (5) years probation.⁶ [Dkt. 41, p.3]. The police report stated that Shannon had rented a car in Phoenix, Arizona, for a one-way trip to Cincinnati, Ohio. During the trip, Shannon was stopped by law enforcement in St. Louis County, Missouri, who discovered two hundred pounds (200 lbs.) of marijuana in the trunk of Shannon's rental car. [Dkt. 41, p.3-4].

6

As such, the conviction does not appear on Shannon's record. [Dkt. 40, p.9]. Shannon's former attorney in Missouri, in an Affidavit, explains:

My name is Murray Stone, attorney for Derman Shannon. Mr. Shannon was arrested in 1994 in St. Louis County, Missouri. The arrest resulted in a Suspended Imposition of Sentence (SIS) and probation. Mr. Shannon successfully completed probation. I explained to Mr. Shannon when this incident arose in 1994 that under Missouri law when a person successfully complete probation after an SIS, such person has no record of a conviction. Therefore, Mr. Shannon's arrest record will show no conviction stemming from this arrest. [Dkt. 51, Exh. A].

On September 5, 2002, as a result of the investigation by DES, Plaintiff was demoted for misrepresenting the nature of this criminal offense. [Dkt. 41, p.4]. Plaintiff's applications for employment allegedly had suggested to DES that a small amount of marijuana was involve for personal use, as opposed to two hundred pounds (200 lbs.), which infers an intent to distribute or sell. [Dkt. 41, p.4]. On September 5, 2002, DES issued Shannon a letter, which explained the charges of misconduct:

The specific charges and explanations are:

You falsified your employment application dated April 15, 1998 and therefore, misled the Department in regards to your felony conviction of 1994/1995. You failed to fully disclose the specific charge (Traffic in Drug 2nd Degree) on your employment application and falsely stated that the conviction was being overturned when in reality, you had never applied to have the conviction overturned. The deliberate misrepresentation, concealment, and inaccuracy of the true facts relating to the felony conviction constitutes 'Fraud in Securing Appointment', which is a violation of Arizona Department of Administration Personnel Rule R2-5-501, Standards of Conduct. [Dkt. 41, Exh.14].

On September 11, 2002, Shannon filed a Charge with the EEOC alleging that he was demoted because of racial discrimination. [Dkt. 41, p.4-5]. Plaintiff met with Knox and Fred "Skip" Bingham ("Bingham:"), DES Rehabilitation Program Administrator, and allegedly decided to accept a voluntary one grade decrease without pay reduction and transfer to the adult unit at DES. [Dkt. 41, p.5].

On November 1, 2002, Plaintiff filed another Charge with the EEOC alleging that DES's "stated reason for demoting me and requiring me to relocate is a pretext for discrimination." [Dkt. 41, p.5; Dkt. 41, Exh. 17].

Shannon filed a Complaint in federal court on December 23, 2002. DES argues that two (2) of Shannon's three (3) alleged discriminatory incidents are time-barred pursuant to the statute of limitations provided by 42 U.S.C.

Sec. 2000e-5(e)(1). [Dkt. 40, p.3, 5-6]. The first incident, in which a co-worker called Shannon a "former pimp," occurred in April 1999, and no EEOC Charge has been filed. [Dkt. 40, p. 5]. The second incident, in which Knox extended Shannon's probationary period for ninety (90) days, occurred in January 2001, and no EEOC Charge has been filed. [Dkt. 40, p. 5-6]. As such, DES argues that the time to file a Complaint regarding those two incidents has expired. The third incident, which Shannon referenced in his EEOC Charge, involved Shannon's demotion, which DES argues was voluntary, legitimate, non-discriminatory act of discipline [Dkt. 40, p.6-10; Dkt. 46, p.1].

C. Plaintiff's Response to Defendant's Motion for Summary Judgment
[Dkt. 51].

Shannon filed a Response to Defendant's Motion for Summary Judgment, in which he alleges that he "never deliberately misrepresented any fact [about his criminal

record] as alleged by Defendant in any application that Plaintiff submitted . . . DES. . .” [Dkt. 52, Par. 2]. Shannon contends that “[i]t’s simple, Defendant demoted plaintiff because of Plaintiff’s knowledge of more than a decade of agency malfeasance committed by Skip Bingham and Barbara Knox during their employment with RSA; Plaintiff reported to Knox evidence of RSA under Knox and Bingham’s leadership misrepresentation of Dollars (tens of thousands of Taxpayer’s dollars) also. [Dkt. 52, Par. 4]. Further, Shannon asserts that DES’s “ruse of pretext demotion was for retaliation reasons as well as a desperate attempt to cover-up more than a decade of violations for inefficiency, ineffectiveness, wanton and willful negligence and many other State of Arizona DES Policies that RSA promised to comply with.” [Dkt. 52, Par. 4].

Shannon maintains that “it is abundantly clear that there is no conviction” for “Traffic in Drugs Second Degree”

because no sentence was imposed. [Dkt. 52, Par 7]. As such, the demotion based upon that conviction is a "pretext to racial discrimination." [Dkt. 52, Par 7].

Further, Shannon asserts that Bingham lied in his Affidavit. [Dkt. 52, Par 8]. Shannon also denies that he accepted a voluntary one grade demotion as alleged by DES. [Dkt. 52, Par. 10]. Rather, Shannon claims he "was forced out of the Grade 19 position . . . by being conspired against by DES management as a precursor to violating Plaintiff's Civil Rights. . ." [Dkt. 52, Par. 10].

Shannon concludes that "Defendant lied on every piece of document [sic] that it submitted (filed) in the United States District Court, as a clear cover-up for subjecting Plaintiff (and the majority of African-American males) to hostile work environment, disparate impact, malfeasance, neglect, retaliation, and conspiracy." [Dkt. 52, "Conclusion"].

D. Defendant's Reply to its Motion for Summary Judgment [Dkt. 46]

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In its Reply to its Motion for Summary Judgment [Dkt. 46], DES argues that Shannon was hired despite his criminal record because "[t]he implication was clear that the amount of marijuana was small enough to be hidden in a car, and Plaintiff did not know about it [plus] Plaintiff had a history of work as a middle school teacher, and had a good education." [Dkt. 46, p.2]. Therefore, the discovery that two-hundred pounds (200 lbs.) of marijuana was involved "raised concerns about Plaintiff's honesty in his applications. . ." [Dkt. 46, p. 2].

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Shannon does not provide details as to which parts of the Affidavit constitute alleged lies.

⁹

Shannon filed his Response after DES filed their Reply; however, it appears Shannon timely served DES with his Response without filing same with the Court. As such, the docket numbers appear out of order.

DES cites to conflicting stories told by Shannon regarding how and when the marijuana may have been placed in the trunk. [Dkt. 46, p.2-3].

DES contends that two of the incidents Shannon complains of are time-barred pursuant to the statute of limitations provided in 42 U.S.C. Sec. 2000e-5(e)(1), and that the third incident was a legitimate, non-discriminatory act of discipline [Dkt 46, p.4-7]. To support its arguments, and pursuant to the Court's order at the June 21, 2004 hearing, DES submitted to the Court by fax an Interoffice Memo written by Shannon. The memo read, in its entirety:

For personal reasons, this is to request a Voluntary Grade Decrease from a Rehabilitation Services Program Representative, grade 19, ADED^^^AAE, to accept a position as a Rehabilitation Services Specialist III, grade 18, ADEB890AAN, effective October 21, 2002.

I understand that I will retain my permanent status, salary and this Voluntary Grade Decrease will result in my acceptance of a Rehabilitation Services Specialist III, grade 18. I fully understand that if I promote within one year to the class held prior to this voluntary grade decrease request, my salary shall be set the same as in accordance with

the Department of Administration (DOA) Personnel Rule R2-5-303.Q.3.

However, if I promote to a different job classification and title other than that held prior to the voluntary Grade Decrease, my salary shall be set as in accordance with Department of Administration Personnel Rule R2-5-303.Q.4.

Furthermore, I am aware that I have no right to grieve this Voluntary Grade Decrease, which I have knowingly requested.

[Fax of June 21, 2004].

The Interoffice Memo is dated October 17, 2002, and signed by Shannon. Further, the next day, October 18, 2002, Shannon wrote Bingham a letter:

Skip Bingham,

I am on sick leave today. After consultation and thought, yesterday's offer of accepting job [sic] with pay of \$30K or accepting he same job with same grade 18 status with pay of \$33K (present salary) has been decided [sic]:

Grade 18 w/my present salary is my choice.

[Fax of June 21, 2004].

The letter is signed by Shannon.

II. Standard of Review

Summary judgment is proper "only if no genuine issues of material fact remain for trial and the moving party is

entitled to judgment as a matter of law.” Block v. city of Los Angeles, 253 F. 3d 410, 416 (9th Cir. 2001). Moreover, the Court must view evidence in a light most favorable to the nonmoving party. Id.

III. Discussion

A. Count One (Co-worker’s Comment) and Count Two (Extension of Probation)

1. Title VII

DES contends, in its Reply, that its Motion for Summary Judgment “is based on the fact that two of the three alleged discriminatory incidents raised by Shannon in his Complaint are barred by the statute of limitations. . .” [Dkt. 46, p.1].

Title VII provides a statute of limitation on employment discrimination claims:

A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

42 U.S.C. Sec 2000e-5(e)(1).

The Supreme Court has held that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.' A party, therefore, must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it." Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 110, 122 S.Ct. 2061, 2070 (2002); see 42 U.S.C. Sec

2000e-5(e)(1).

Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice.' [Plaintiff] can only file a charge to cover discrete acts that 'occurred' within the appropriate time period.

Id. At 114, 2074.

On the other hand,

[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.

Id. At 115, 2073

It is clear from Morgan that a termination, failure to promote, denial of transfer, and refusal to hire are discrete, separate, actionable unlawful employment practices. Thus, allegations of such employment practices, which occurred more than 180 days prior to December 23, 2002, are now time-barred in this action if the allegations were not raised in either of the EEOC Charges filed by Shannon.

2. EEOC Charges

Shannon filed two EEOC Charges. The first Charge was on September 11, 2002, and reads:

PERSONAL HARM: On September 5, 2002 I was notified that a demotion was being considered for me in my position as Vocational Rehabilitation Service Program Representative. I have been employed with the State since June 1998.

RESPONDENT'S REASON FOR ADVERSE ACTION: Acting Assistant Director Thomas Colombo told me the demotion was being considered because of charges surrounding my April 15, 1998 application.

DISCRIMINATION STATEMENT: I believe I have been discriminated against because of my race (Black) in violation of Title VII of the Civil Rights Act of 1964, as amended.

The department alleges that I falsified my employment applications by misleading them with regard to a felony conviction of 1994/1995. They say I failed to fully disclose the specific charge related to a felony, and that I falsely said a conviction had been overturned when it had not. I did not mislead [sic] the department on my application, because I noted my felonies and I fully explained them. The department had my applications when I was hired and when I applied for other jobs; they have never questioned me about it. I believe the department is setting me for discipline because of my race.
[Dkt. 41, Exh. 15].

On September 23, 2002, the EEOC issued a Dismissal

and Notice of Rights. The EEOC found that "[b]ased upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised this charge." [Fax of June 21, 2004].

Shannon filed his second Charge of discrimination with the EEOC on November 1, 2002, which reads:

1 In September of 2002 I filed a charge of discrimination with the EEOC (350-A-203099). On October 17, 2002 I was demoted in grade and moved to another location. This is the second time I have been required to relocate.

2 I have reason to believe that the employer's stated reason for demoting me and requiring me to relocate is pretext for discrimination.

3 I believe that I have been discriminated against because of my race, Black, and gender, male, and retaliated against in violation of Title VII of the Civil Rights Act of 1964, as amended.

[Dkt. 41, Exh. 17].

On November 21, 2002, the EEOC issued a Dismissal

and Notice of Rights, with identical findings to that of Shannon's first Charge filed on September 11, 2002.

The first incident (count One), in which a co-worker called Shannon a "former pimp," is a separate, actionable unlawful employment practice. See id. At 114, 2074. The comment occurred on a single day in April 1999. Shannon did not mention the comment in either of the EEOC Charges that he filed.

The second incident (Count Two), in which Knox extended Shannon's probationary period for ninety (90) days, in arguably similar to a failure to promote.

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The extension of Shannon's probationary period does not involve "repeated conduct" so as to amount to a "hostile environment." See id. At 115, 2073. Shannon's probationary extension occurred in January 2001, and did not repeatedly occur thereafter. ~~Shannon~~ Shannon did not mention

Knox's recommendation that Shannon's probationary period be extended in either of the EEOC Charges he filed.

Pursuant to the statute of limitations, Counts One and Two of Plaintiff's Complaint are time-barred as having not been raised in either EEOC Charge. Therefore, summary judgment will be granted in favor of DES with respect to these two counts.

B. Count Three (Demotion)

The parties dispute material facts regarding the third

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The Court just determine whether each of Shannon's claims stem from a separate, discrete action or an on-going hostile work environment in order to apply the appropriate statute of limitations. The Court likens Shannon's extended probationary period to a failure to promote, which was determined to be a separate, discrete action in Morgan, for the sole purpose of determining the allotted time in which Shannon had to file a claim. If an employer's failure to promote, which arguably can have far-reaching and long-lasting consequences to the employee, is considered a separate, discrete act, then Shannon's extended probationary period, arguably of less consequence, is a separate, discrete act.

discriminatory act of discipline. [Dkt. 40, p.6-10; Dkt. 46 p.1]. Shannon asserts that "Defendant demoted plaintiff because of Plaintiff's knowledge of more than a decade of agency malfeasance committed by Skip Bingham and Barbara Knox during their employment with RSA." [Dkt. 52 Par. 4]. Further, Shannon contends that he "was forced out of the Grade 19 position. . . by being conspired against by DES management as a precursor to violation Plaintiff's civil Rights. . ." [Dkt. 52, Par. 10] (emphasis added).

There is a high standard for the granting of summary judgment in employment discrimination cases." Nidds v. Schindler Elevator Corp., 113 F.3d 912, 921, (9th Cir. 1996)(quoting Schnidrig v. Colombia Mach., Inc., 80 F. 3d 1406, 1410 (9th Cir. 1996)). The Ninth Circuit has held that "[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in

order to overcome an employer's motion for summary judgment.. This is because 'the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a fact finder upon a full record.'" Chuang v. Univ. of Calif. Davis, Bd. Of Trustees, 225 F.3d 1115, 1124 (9th Cir. 2000). The Interoffice Memo provided to the Court on June 21, 2004 resolves the dispute of fact regarding whether the demotion was voluntary or involuntary. Shannon averred that for personal reasons, [I] request a Voluntary Grade Decrease" and that "I am aware

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A letter dated October 17, 2002, from Thomas Colombo Acting Assistant Director-division of Employment and Rehabilitation Services, to Shannon belies DES's claim that the demotion was an "act of discipline." The letter closes with the following sentence: "Since this action is voluntary and because you have an acceptable record of State Service, this letter will be placed in your official personnel file to show that this was the result of your voluntary request and *not because of disciplinary action.*" [Dkt. 51, Exh. DF 383] (emphasis added). The Court finds the demotion to be voluntary pursuant to Shannon's interoffice Memo of October 17, 2002, and his handwritten letter of October 18, 2002.

that I have no right to grieve this Voluntary Grade Decrease,

which I have knowingly requested.” As such, there is no disputed issue of material fact for a jury to resolve regarding the impetus of Shannon’s demotion. Shannon has provided

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no evidence to suggest that he did not voluntarily accept the demotion or that the demotion was involuntary or based on race, gender, or retaliation.

IV. Conclusion

Counts One and Two are time-barred pursuant to 42 U.S.C. Sec. 2000e-5(e) (1) and Nat’l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 110, 122 S.Ct. 2061, 2070 (2002). Therefore, Counts One and Two are dismissed.

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The Court notes Shannon’s diligence over the past two years in litigating this matter in pro per. However, while Shannon included hundreds of pages of information with his Response to DES’s Motion for Summary Judgment, he did not produce any evidence of discrimination or retaliation to counter his written, voluntary request for a one-grade demotion.

Count Three is dismissed because Shannon failed to produce any evidence of retaliation or discrimination by DES to counter the evidence of his written, voluntary request for a one grade demotion.

Accordingly,

IT IS ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**. [Dkt. 40-1].

IT IS ORDERED that Plaintiff's Complaint is **DISMISSED**.

IT IS FURTHER ORDERED that Plaintiff's Motion in Limine is **DENIED** as moot. [Dkt. 84].

DATED this 29 day of June, 2004.

"s/ Earl H. Carroll"
Earl H. Carroll
United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

DERMAN SHANNON,
Plaintiff

v.

ARIZONA DEPARTMENT
OF ECONOMIC SECURITY
VOCATIONAL
REHABILITATION
SERVICES ADMINISTRATION,
Defendant.

)
) **JUDGMENT**
) **IN A CIVIL**
) **CASE**

)
) CIV 02-2585-
) PHX-EHC

— Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by Court. This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

— IT IS ORDERED AND ADJUDGED granting the Defendant's Motion for Summary Judgment. Plaintiff shall take nothing; this action and complaint are hereby dismissed.

June 30th 2004
Date

RICHARD H. WEARE
District Court Executive/Clerk

Cc: (all counsel)

"s/Kathleen M. Hicha"
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

DERMAN SHANNON)
	) CASE NO. CIVO2-2585
Plaintiff,	) PHX EHC
)
Vs.)
	) JOINT PROPOSED
	) CASE MANAGEMENT
	) PLAN
ARIZONA DEPARTMENT OF)
ECONOMIC SECURITY)
VOCATIONAL)
REHABILITATION)
SERVICES ADMINISTRATION,)
)
Defendant.)
_____)

*** (d) [p. 5] The Legal Basis of the Defense:

Plaintiff's demotion was based on a **valid** and **non-discriminatory reason**; Plaintiff's conviction for drug trafficking disqualified him from having direct contact with juveniles under the jurisdiction of the Department of Juvenile Corrections and the Maricopa County Juvenile Probation Department. *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (2000). ***

By: "s/Thomas A McGuire"
Assistant Attorney General
Attorneys for Defendant